Liang Court Wanisara (Sarawak) Sdn Bhd v Mohamed Shookry Abdul Ghani & Ors

HIGH COURT (KUCHING) — SUIT NO 22–194 OF 2010-II
STEPHEN CHUNG J
4 OCTOBER 2013

Contract — Building contract — Breach — Golf course development agreement — Refusal to pay balance contract sum — Failure to construct golf course of competition standard — Failure to complete subsoil drainage system and landscaping — Breach established

Professions — Architects — Negligence — Defective construction and failure of contractor to complete construction — Whether architect owes a duty of care to ensure proper construction and completion by contractor

Tort — Fraud — Collusion to commit fraud — Whether contractor had colluded with architect to fraudulently certify satisfactory completion of construction works — Standard of proof beyond reasonable doubt — No evidence of collusion or concealment

Tort — Negligence — Duty of care — Test for establishing duty of care — Architects — Defective construction and failure of contractor to complete construction — Whether architect owes a duty of care to ensure proper construction and completion by contractor

Tort — Negligence — Professional negligence — Architects — Defective construction and failure of contractor to complete construction — Whether architect in breach of duty to ensure proper construction and completion by contractor

By a golf course development agreement ('the agreement'), the Sarawak Club ('the club') appointed the plaintiff as its contractor to design and build a golf course and club house. The plaintiff appointed Yong Yong Construction and Development Sdn Bhd ('Yong Yong') as its subcontractor and E&G Parslow (M) Sdn Bhd ('E&G Parslow') as the golf course architect ('architect'). The plaintiff claimed that it had completed the project and had handed over the golf course and club house to the club subject to some remedial works to be carried out during the agreed one year defect liability period. The golf course

defects inspection reports listed 139 defects to be carried out. The club subsequently accepted the final account and agreed to pay the sum of RM2,256,800 to the plaintiff. The club paid RM300,000 but failed to pay the balance of RM1,956,800. In this action, the plaintiff claimed this sum against the club. The club contended that the plaintiff was not entitled to any payment until there was proper certification for actual works completed under the agreement. The club contended that the plaintiff failed to construct a golf course of competition standard in accordance to the terms of the agreement. The club complained that the drainage of the golf pits constructed was highly defective, not in accordance with the design and specifications and that the golf course constructed was not fit for its purpose. The club further contended that: (i) the architect owed a duty of care to the club and in breach of that duty, the architect had failed to ensure that the plaintiff had built and completed the golf course of competition standard; (ii) that Mr Tan Chong Ling ('PW1'), a director and the principal officer of the plaintiff, had colluded with the architect to fraudulently certify that the works under the contract had been satisfactorily carried out and completed which in fact were not; and (iii) that E&G Parslow had colluded with PW1 to commit fraud on the club because the certificate of practical completion was signed although the golf course was not of competition standard. The club claimed that as a result it had to carry out remedial works to the golf course and club house and had incurred loss and damages, including loss of revenues resulting from lower club membership subscriptions and lower usage of the golf course. The club thus sued the plaintiff, PW1 and E&G Parslow by way of counterclaim for the loss and damages. The issue for trial was whether the plaintiff had completed the golf course, in particular the subsoil drainage system, in accordance with the terms of the contract.

Held:

(1) There was no confirmation that the club had agreed to the plaintiff not to complete the subsoil drainage works. The plaintiff's contention that the plaintiff did not complete the subsoil drainage on the instructions of the club could not be sustained. There was also no reason for the plaintiff not to complete the subsoil drainage system and landscaping of the golf course due to any costs over run or cost savings (see paras 46 & 48).

(2) The evidence established that the plaintiff did not complete the subsoil drainage system and landscaping. Hence, it did not complete the golf course as at 30 August 2008. Therefore the plaintiff had breached the contracts and the club was entitled to compensation. The plaintiff failed to prove that it was entitled to be paid the sum of RM1,956,800 (see para 50).

(3) The standard of proof required where there is an allegation of fraud in a civil proceeding is one of beyond reasonable doubt and not on a balance

of probabilities. In respect of the allegation of fraudulent collusion, the tort of collusion or conspiracy to defraud involves an element of fraud. The standard of proof is also beyond reasonable doubt (see para 52).

(4) There was no evidence of collusion or concealment by the plaintiff, PW1 and or E&G Parslow on the subsoil drainage system of the golf course (see para 57).

(5) Although E&G Parslow as the golf course architect would be able to foresee that the various acts or omissions complained of would result in delays or non-completion of the works by the plaintiff and consequential financial loss to the club, foreseeability of harm or damages is not the only test or factor in determining the existence of a duty of care. As a matter of law, foreseeability of injury or damage does not automatically lead to a duty of care. In addition to the foreseeability of damage, there should exist, between the party owing the duty and the party to whom it is owed, a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable and that the law should impose a duty of a given scope upon the one party for the benefit of the other (see para 60).

(6) E&G Parslow's role was to design and prepare the specifications of the golf course. There was no complaint on the design or specifications of the golf course prepared by E&G Parslow. There was no loss or damage caused to the club from the design or specifications. Hence, there was no reason to impose a duty of care on E&G Parslow based on the facts (see para 64).

(7) The complaints of the club that the plaintiff failed to complete the golf course, which amounted to a breach of contract, was outside the scope and responsibility of E&G Parslow as the architect. Hence, there was no negligence or any duty of care by E&G Parslow to the cub (see para 65).

[Bahasa Malaysia summary

Melalui perjanjian pembangunan sebuah padang golf ('perjanjian'), Kelab Sarawak ('kelab tersebut') melantik plaintif sebagai kontraktornya untuk mereka bentuk dan membina sebuah padang golf dan rumah kelab. Plaintif melantik Yong Yong Construction and Development Sdn Bhd ('Yong Yong') sebagai subkontraktornya dan E&G Parslow (M) Sdn Bhd ('E&G Parslow') sebagai arkitek padang golf ('arkitek'). Plaintif mendakwa bahawa ia telah menyempurnakan projek dan telah menyerahkan padang golf dan rumah kelab kepada kelab tertakluk kepada sedikit kerja-kerja penyelenggaraan untuk dijalankan dalam tempoh satu tahun liabiliti kerosakan yang telah dipersetujui. Laporan pemeriksaan kerosakan padang golf menyenaraikan 139 kerosakan yang harus dijalankan. Kelab selanjutnya menerima akaun akhir tersebut dan bersetuju untuk membayar jumlah sebanyak RM2,256,800 kepada plaintif.

Kelab telah membayar RM300,000 tetapi gagal untuk membayar baki sebanyak RM1,956,800. Dalam tindakan ini, plaintif menuntut jumlah tersebut daripada kelab. Kelab berhujah bahawa plaintif gagal untuk membina padang golf mengikut standard persaingan menurut terma perjanjian. Kelab mengadu bahawa kumbahan lubang golf yang dibina rosak dengan teruk, tidak mengikut reka bentuk dan spesifikasi dan bahawa padang golf yang dibina tidak bersesuaian dengan tujuannya. Kelab selanjutnya berhujah bahawa: (i) arkitek mempunyai kewajipan berhati-hati terhadap kelab dan bercanggah dengan kewajipan tersebut, arkitek telah gagal untuk memastikan bahawa plaintif telah membina dan menyempurnakan padang golf yang berstandard persaingan; (ii) bahawa Mr Tan Chong Ling ('PW'), pengarah dan pegawai prinsipal plaintif, telah berpakat dengan arkitek untuk secara fraud mengesahkan bahawa kerja-kerja di bawah kontrak telah dijalankan dengan baik dan telah disempurnakan sedangkan ia adalah sebaliknya; dan (iii) bahawa E&G Parslow telah berpakat dengan PW1 untuk melakukan fraud terhadap kelab kerana sijil penyempurnaan praktikal telah ditandatangani meskipun padang golf bukanlah pada standard persaingan. Kelab mendakwa bahawa sebagai akibat ia terpaksa melakukan kerja-kerja penyelenggaraan ke atas padang golf dan rumah kelab dan telah menanggung kerugian dan kerosakan, termasuk kehilangan hasil disebabkan langganan keahlian kelab yang rendah dan penggunaan padang golf yang berkurangan. Kelab justeru menyaman plaintif, PW1 dan E&G Parslow melalui tuntutan balas untuk kerugian dan kerosakan. Isu untuk perbicaraan adalah sama ada plaintif telah menyempurnakan padang golf, terutamanya sistem kumbahan tanah, menurut terma kontrak.

Diputuskan:

(1) Tidak terdapat pengesahan bahawa kelab telah bersetuju dengan plaintif untuk tidak menyempurnakan kerja-kerja kumbahan tanah. Hujahan plaintif bahawa plaintif tidak menyempurnakan kumbahan tanah atas arahan kelab tidak boleh dipertahankan. Tiada sebab bagi plaintif untuk tidak menyempurnakan sistem kumbahan tanah dan pelanskapan padang golf oleh sebab sebarang kos berlebihan atau penjimatan kos (lihat perenggan 46 & 48).

(2) Keterangan membuktikan bahawa plaintif tidak menyempurnakan sistem kumbahan tanah dan pelanskapan. Justeru, ia tidak menyempurnakan padang golf pada 30 Ogos 2008. Oleh itu plaintif telah memungkiri kontrak dan kelab berhak menerima pampasan. Plaintif gagal untuk membuktikan bahawa ia berhak untuk menerima jumlah RM1,956,800 tersebut (lihat perenggan 50).

(3) Standard pembuktian yang diperlukan di mana terdapat dakwaan fraud di dalam prosiding-prosiding sivil adalah melampaui keraguan yang munasabah dan bukanlah imbangan kebarangkalian. Berkaitan dakwaan

pakatan sulit bersifat fraud, tort pakatan sulit atau subahat untuk melakukan fraud melibatkan elemen fraud. Standard pembuktian juga adalah melampaui keraguan munasabah (lihat perenggan 52).

(4) Tidak terdapat keterangan pakatan sulit atau penyembunyian oleh plaintif, PW1 dan atau E&G Parslow mengenai sistem kumbahan tanah padang golf (lihat perenggan 57).

(5) Meskipun E&G Parslow sebagai arkitek padang golf dapat menjangka bahawa pelbagai tindakan atau kealpaan yang diadu yang mana boleh menyebabkan kelewatan atau ketidaksempurnaan kerja-kerja oleh plaintif dan kerugian turutan kewangan terhadap kelab, jangkaan bahaya atau kerugian bukanlah satu-satunya ujian atau faktor dalam menentukan kewujudan kewajipan berhati-hati. Sebagai perkara perundangan, jangkaan kecederaan atau kerosakan tidak secara automatik membawa kepada kewajipan berhati-hati. Tambahan kepada jangkaan kerugian, suatu hubungan yang dikategorikan oleh undang-undang sebagai 'proximity' atau 'neighbourhood' harus wujud di antara pihak yang mempunyai kewajipan dan pihak yang mana kewajipan harus diberikan dan situasi tersebut hendaklah menjadi suatu situasi di mana mahkamah berasa adil, saksama dan berpatutan dan bahawa undang-undang seharusnya mengenakan kewajipan mengikut skop yang diberikan ke atas satu pihak untuk manfaat pihak yang lagi satu (lihat perenggan 60).

(6) Peranan E&G Parslow adalah untuk mereka bentuk dan menyediakan spesifikasi padang golf. Tiada aduan dibuat terhadap reka bentuk atau spesifikasi padang golf yang disediakan oleh E&G Parslow. Tiada kerosakan atau kerugian yang dialami oleh kelab daripada reka bentuk atau spesifikasi tersebut. Justeru, berdasarkan fakta, tidak terdapat sebab untuk mengenakan kewajipan berhati-hati ke atas E&G Parslow (lihat perenggan 64).

(7) Aduan oleh kelab bahawa plaintif gagal untuk menyempurnakan padang golf, yang mana membentuk kemungkiran kontrak, adalah di luar skop dan tanggungjawab E&G Parslow sebagai arkitek. Oleh demikian, tidak terdapat kecuaian atau sebarang kewajipan berhati-hati oleh E&G Parslow kepada kelab (lihat perenggan 65).]

Notes

For cases on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3503–3538.

For cases on negligence, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1773–1774.

For cases on duty of care, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1248–1334.

For cases on professional negligence, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1459–1549.

Cases referred to

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 CLJ 1, FC (refd)

Caparo Industries Plc v Dickman [1990] 2 AC 605, HL (refd)

Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a firm) & Ors [1997] 3 MLJ 546; [1999] 8 CLJ 131, HC (refd)

Kerajaan Malaysia lwn Cheah Foong Chiew dan lain-lain [1993] 2 MLJ 439, HC (refd)

Loh Chiak Eong & Anor v Lok Kok Beng & Ors [2013] 1 MLJ 27, CA (refd)

Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd [1924] 1 KB 1, CA (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 644, HC (refd)

RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 10750 & Anor [1999] 2 SLR 449, CA (distd)

SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393; [2010] 9 CLJ 389, CA (refd)

Wah Tat Bank Ltd & Ors v Chan Cheng Kum [1975] 1 MLJ 97, PC (refd)

Victor Ng (Robert Goh with him) (Tang & Partners) for the plaintiff.
Shankar Ram (Francis Teron & Daniel Lim with him) (Thomas, Shankar Ram & Co) for the defendant.

Stephen Chung J:

[1] By a golf course development agreement dated 12 September 2005 ('the agreement'), the Sarawak club ('the club') appointed the plaintiff as its turnkey contractor to design and build an 18 hole golf course including a club house for a contract sum of RM12m, subject to the terms and conditions contained in the contract. Under the contract the plaintiff was to design, build and complete the project within 36 months from the date of possession given by the club.

[2] Clause 7.5 of the agreement stated that the plaintiff would not claim for any cost overrun and absorb it as the plaintiffs contribution for the project in the event the costs exceeded the agreed contract sum of RM12m.

[3] The plaintiff appointed Yong Yong Construction and Development Sdn Bhd ('Yong Yong') as its subcontractor for the golf course project for a contract sum of RM15,500,000 pursuant to a contract dated 22 September 2005. Yong Yong, with the consent of the plaintiff and the club, engaged E & G Parslow

(M) Sdn Bhd ('E & G Parslow') as the golf course architect ('architect') under a contract dated 5 October 2005. Mr Kho Yong Hwa ('PW2') was appointed the project management consultant cum technical adviser under a letter of appointment dated 25 June 2005 by the plaintiff. The plaintiff also appointed Spago Property Sdn Bhd as its subcontractor for the golf club house project for a contract sum of RM5,800,000 pursuant to a contract dated 29 September 2006.

[4] From the above contracts, obviously the contract sum of RM12m was not sufficient to build and complete the golf course and golf course club house. The plaintiff and the club had agreed to vary the terms and conditions of the agreement. This was discussed in a letter from the club to the plaintiff dated 13 June 2005 (p 56 of bundle E).

[5] By a supplementary deed, also dated 12 September 2005 ('the deed'), in consideration of the plaintiff agreeing to maintain the contract sum and not to increase the agreed contract sum or claim further sum beyond the agreed contract sum of RM12m for extra works performed or variations agreed to be carried out to the golf course and the clubhouse as may be agreed between them, the club agreed to support the plaintiff to secure alienation of 62 acres of land adjoining the golf course by the Sarawak Government. Clause 3(a) of the deed stated that in the event the plaintiff was unable to secure the alienation of the land, the plaintiff might claim a maximum of RM20m as the agreed contract sum in lieu of the RM12m.

[6] The plaintiff claimed that it had completed the project on 30 August 2008 and had handed over the golf course and club house to the club on 1 September 2008, subject to some remedial works to be carried out during the agreed one year defect liability period.

[7] The golf course defects inspection reports dated 13 November 2008, 17 November 2008 and 26 November 2008 listed 139 defects to be carried out (see pp 30–35 of bundle I). The plaintiff then submitted its final account to the club for the balance of the contract sum of RM2,256,800 as at 18 September 2009 to be paid by the club (see p 85 of BOD I). On 30 September 2009, at the request of the club, E & G Parslow prepared a report which identified the final 12 defects to be remedied (see pp 95–98 of bundle I). The final 12 defects were set out in para 11 of the statement of claim. The report was confirmed and accepted by the club on 5 October 2009 (see p 102 of bundle I). The plaintiff asserted that Yong Yong had remedied the defects and had informed the club via its letters dated 22 October 2009 and 12 November 2009 respectively.

[8] The facts showed that the club by a letter dated 20 October 2009 had accepted the final account and agreed to pay the sum of RM2,256,800 to the

plaintiff (see p 105 of bundle I). The club had made a payment of RM300,000 in October 2009. Since then, the club had failed to pay the balance due and owing which amounted to RM1,956,800 plus agreed interest at 10% which was calculated at RM331,730. In this action, the plaintiff claimed this sum plus the accrued interest against the club.

[9] The club denied the plaintiff's claims and contended that the plaintiff was not entitled to any payment until and unless there was proper certification for actual works completed under the agreement. It was the club's contention that the plaintiff, inter alia, had failed to construct a golf course of competition standard in accordance to the terms and conditions of the agreement. The club contended that it was a requirement under the agreement that the surface water run-off to be not more than 30 minutes and that the plaintiff was required to install a drainage system and subsoil drains to ensure that the playable zones, greens, fairways and tee boxes were not water-logged after rainfall or soggy after several days of dry weather (see cl 5.2.1 of the agreement and para 1.e) of annexure C2 of the agreement).

[10] In particular, the club complained that the design as directed and or advised by the said consultants was to have 209 drainage pits with double rings and 115 drainage pits with single rings. The club complained that the plaintiff failed to construct all the pits and that many of the pits were not constructed in accordance with the specifications and or design of the agreement. The club complained that the golf course could not be said to have been completed, that the drainage of the golf pits constructed was highly defective, not in accordance with the design and specifications and that the golf course constructed was not fit for its purpose.

[11] The club also contended that the architect acted as the consultant for the project and in that capacity had liaised with the club and its committees to advise them on the project. It was contended that the club and its members were relying on the architect for its technical expertise and impartiality. It was contended that the architect owed a duty of care to the club. It was contended that, in breach of that duty, the architect had failed to ensure that the plaintiff had built and completed the golf course of competition standard as required by the terms and conditions under the agreement which had resulted in loss and damages to the club.

[12] Further, it was the contention of the club that Mr Tan Chong Ling ('PW1'), a director and the principal officer of the plaintiff, had colluded with the architect to fraudulently certify that the works under the contract had been satisfactorily carried out and completed which in fact were not. The club in particular complained that E & G Parslow had colluded with PW1 to commit fraud on the club because one Jason Winter ('CW1') of E & G Parslow had

signed the certificate of practical completion dated 30 August 2008 (p 29 of BOD I) although Ted Parslow ('CW3'), the principal of E & G Parslow, had decided not to do so as the golf course was not of competition standard.

[13] The club claimed that as a result it had to carry out remedial works to the golf course and the club house and had incurred loss and damages, including loss of revenues resulting from lower club membership subscriptions and lower usage of the golf course. Therefore the club sued the plaintiff, PWl and E & G Parslow as the first, second and third defendants by way of counterclaim for the loss and damages.

[14] This trial commenced before the then presiding High Court judge and was adjourned for parties to attempt mediation to resolve their disputes. The mediation was not successful and the parties had agreed that the trial be continued before me. At the commencement of trial, several bundles of documents were marked and used for the trial. Parties had agreed to the authenticity of these documents, the contents being subject to cross-examination and subject to proof.

[15] The issue for trial is whether the plaintiff had completed the golf course, in particular the subsoil drainage system, in accordance with the terms and conditions of the contract.

[16] Clause 5.2.3 of the agreement stated that upon physical completion, the developer would issue a physical completion notice to the club and the handover of the golf course and club house to the club would be deemed to be effective 60 days after the physical completion notice, even if the club failed to take over the golf course and club house.

[17] This contrasted with para 16.1 of the conditions of contract document in annexure D of the agreement which provided that when the works had reached practical completion, the developer (the plaintiff) would give the club a written statement supported by the consultant's certificate of practical completion to that effect and practical completion of the works would be deemed for all purposes of the contract to have taken place on the day named in such statement ie on 30 August 2008.

[18] Paragraph 1.4 of the conditions of contract stated that in the event of conflict between the terms of the conditions and the other terms of the contract (ie the agreement), the club would have the choice to which clause, sub-cl, paragraph, sub-para, appendix or annexure of the conflicting versions from the documents to adopt for use and the definitions used in the agreement might be used in the conditions where the context admitted it.

[19] From the pleadings, documents and evidence before the court, the parties had interchangeably referred to physical or practical completion. During the trial, the parties had referred to and submitted extensively on the certificate of practical completion. The agreement, which referred to the physical completion notice, did not mention nor provide for a certificate of practical completion to be attached and signed by the plaintiff or by its consultants. Clause 5.2.3 of the agreement and para 16.1 of the conditions of contract document, read together, required the developer ie the plaintiff to issue a physical completion notice supported by the consultant's certificate of practical completion.

[20] The evidence showed that by a golf course physical completion notice dated 1 September 2008 (p 145 of bundle E), the plaintiff gave notice pursuant to cl 5.2.3 of the agreement that the golf course was physically completed and enclosed a certificate of practical completion pursuant to para 16.1. Although para 16.1 referred to the consultant's certificate of practical completion, this was not defined in the conditions of contract document nor in the agreement.

[21] The evidence showed that the plaintiff had appointed PW2 as the project management consultant cum technical advisor. Pursuant to his appointment, he was responsible to report directly to the plaintiff on all issues and matters pertaining to the project, including signing or endorsing all documentation. He would be the consultant referred to and he had signed on the certificate of practical completion ('CPC'). The evidence showed that the CPC was also signed by Jason Winter ('CW1') of E & G Parslow.

[22] The minutes of meeting of the golf course development subcommittee (GCD subcommittee) held on 21 June 2008 (pp 43–44 of bundle E) recorded that the contractual completion date was on 31 August 2008, that the first 9 holes were completed and playable and that works were continuing to complete the project by the completion date. By a letter dated 4 July 2008 from the club, the club confirmed that the golf course and club house pre-handover inspection would be carried out on 15 July 2008 (p 28 of bundle I).

[23] By the certificate of practical completion ('CPC') dated 30 August 2008 signed by PW2 and CW1, the plaintiff certified that the golf course project was physically or practically completed on 30 August 2008 subject to the completion of any outstanding work and the making good of any defects and that possession thereof to the club was given on 1 September 2008 (p 29 of bundle I).

[24] Similarly, the agreement and the deed did not refer to nor provide for any final account and final statement. This was provided for in para 30.6 of the conditions of contract document. The facts showed that the plaintiff had issued

A the final account and final statement to the club which was confirmed by the club. Was the club bound by the confirmation?

[25] I refer to para 1.4 of the conditions of contract document again which provided a choice to the club and the club had confirmed the final account and
B final statement. However, para 30.6.2 stated that the contract sum would be adjusted in accordance with the conditions together with the adjustments in 30.6.3 and 30.6.4. The final account and final exhibited did not set out the amount of any valuation of the omission of work in accordance with the instruction of the club nor any sums or costs incurred in providing the
C additional facilities to the club house contrary to paras 30.6.3.3 and 30.6.3.4.

[26] Paragraph 30.5 of the condition was also applicable which stated that the club was entitled at all times to exercise any right under the contract of deductions from monies due to the plaintiff against any amount due from the
D plaintiff to the club provided such right should not be exercised unreasonably or vexatiously. Therefore the final account and final statement could not be deemed to be final but was subject to adjustments and deductions pursuant to the contract documents.

E

[27] Subsequent to the golf course defects inspection reports of November, 2008, the club was not satisfied with the works and or remedial works to the golf course. The club requested for a CPC from E & G Parslow by 31 July 2009 (see p 39 of bundle I). By a letter dated 25 April 2009 (p43 of bundle I), the
F club advised the plaintiff that the remedial works were not carried out or not done to the expected standard. The letter stated that this had caused delay in the completion of the golf course to the standard that the CPC could be signed by the course architect.

G **[28]** By another letter also dated 25 April 2009 (p 44 of bundle I), the club management committee highlighted some queries on the CPC including the fact that CW3 had informed Mr Simon Woon ('DW7') that in early September, 2008, CW3 had not and would not sign the CPC since the condition of the golf course was still not constructed to the expected standard.

H

[29] The plaintiff replied to the two letters dated 25 April 2009 by stating that the plaintiff would call their consultants to reply to the letters on the CPC. It also put on record that since 1 September 2008 the club had accepted possession of the golf course after the CPC was issued and that the club
I members were using the facilities (p 45 of bundle I).

[30] CW3 by a letter dated 30 April 2009 (p 47 of bundle I) advised that Jason Winter, as a full member of the Society of Australian Golf Course Architect and senior member of his staff, had complete authority to sign any

documents pertaining to the project ie including the CPC. He stated that he and CW1 had inspected the golf course to determine the outstanding defects which were not to his satisfaction. CW3 explained that although he might have said that he would not be signing off the golf course at that time, it was understood that a further joint inspection would take place and that the completion of defects would form a condition of any CPC.

[31] During the trial it was argued whether the subsoil drainage system was included in the specifications and required to be constructed as part of the golf course. The club submitted that the 10 drawings by CW3 (exh D3 1–10) provided for subsoil drainage including single ring and double rings pits and underground drainage pipes to be constructed. The plaintiff submitted that the irrigation system layout drawings (exh P1) and exh D3 1–10 were only proposals and subject to further specification revisions or site amendments. The plaintiff submitted that the drawings prepared by PW2 (see pp 44–45 of bundle N) had amended the above drawings, that these drawings were the final drawings to be used for the golf course construction and did not require single ring or double rings pits to be constructed.

[32] However the drawings prepared by PW2 bore a stamp dated 15 September 2009 and could not be the correct or applicable drawings for the golf course because PW2 had already certified the practical completion of the golf course on 30 August 2008, a year before the drawings dated 15 September 2009 were prepared and signed by PW2. That raised some doubts as to his credibility as a witness in this case.

[33] From the documents before the court, the parties had agreed that subsoil drainage was required to be constructed for the golf course. Paragraph 1.e) of the specifications in annexure CI of the agreement provided that drainage system and subsoil drains must be incorporated to ensure that the playable zones especially the green, fairway and tee boxes are not soggy and wet during average dry weather at the golf course. The contract sum analysis in respect of the drainage works (at p 39 of bundle B) specifically provided for subsoil drains, underground drainage pipes, pipe culverts, manhole covers with grating, gated outlet structure and general inlet/outlet structure.

[34] PW2 had in fact referred to 313 pits including 51 double rings and 165 single ring (see p 46 of bundle N) to be constructed whereas DW2 had said in his reports that there were 306 pits only. The golf course defects inspection report dated 14 November 2008 reported that some subsoil drains were not installed and that the subsoil drain from the tee box to the nearest drain hole had to be installed for hole 1. The report dated 19 November 2008 also required the installation of the subsoil drain for hole 5 and required the plaintiff to remedy the subsoil drainage for hole 8. Therefore it was the

common knowledge of the plaintiff and the club that the subsoil drainage system was required and to be constructed for the golf course. The evidence showed that the subsoil drainage system was constructed. The question is whether the plaintiff had fully constructed or completed the subsoil drainage system?

[35] From the correspondence between the plaintiff and the club, it was obvious the club disputed that the golf course had been completed on 30 August 2008. From the evidence before the court, PW1 had admitted that the plaintiff had omitted and did not complete the subsoil drainage system for the golf course which consisted of single ring and double ring pits and underground drainage pipes. PW1 had during his testimony admitted that the plaintiff had omitted to carry out 93 of these pits.

[36] PW1 had explained that some of these pits and or the subsoil drainage system were not carried out because of cash flow problems encountered by the club due to a fire which destroyed some buildings of the club which resulted in re-value engineering on the instructions of the club. The plaintiff referred to a minutes of meeting of the management committee and golf course and clubhouse development subcommittee on 10 March 2008. Paragraph 14 of the minutes recorded that the president of the club requested the plaintiff to conserve costs to avoid excessive variation orders and to look into further costs savings on landscaping work and other yet to be completed works wherever possible so that the project could be completed in time for the official opening (see pp 38–40 of bundle E).

[37] The plaintiff by a letter dated 11 March 2008 instructed Yong Yong to halt all uncompleted works at the golf course especially the landscaping works, subsoil drainage works, half way houses and course furniture pending the value engineering exercise as per the instructions of the club (see p 101 of Bundle E).

[38] By a letter dated 22 March 2008 (p 106 of Bundle E), the plaintiff advised that only limited savings could be achieved at the last minute and this would be not more than RM100,000, subject to confirmation by the contractors and subcontractors.

[39] The plaintiff by a letter dated 17 July 2008 to the club, which referred to the instructions of the club given in March, 2008, to implement value engineering exercise to include additional interior designs and to install additional facilities such as salt water pools, spa and VIP room at the club house to satisfy the needs of club members, the majority who were not golfers. The letter explained that the costs for these additional facilities had to come from savings to offset the works for the golf course by omitting the subsoil drainage works (see pp 115–116 of bundle E).

[40] The plaintiff submitted that the minutes supported the fact that the value engineering was on the instructions of the club not to complete the subsoil drainage system and therefore the plaintiff could not be faulted in not completing the subsoil drainage system, which was the main complaint of the club in this action.

[41] It should be noted that there was no signature in that minutes of meeting, whether it was the official minutes of meeting of the club and whether it supported or confirmed the fact that it was on the instructions of the club to implement the value engineering exercise and not to complete the subsoil drainage system. The club denied that it had given any such instructions. DW3, who was the general manager of the club, had testified that he could not find the minutes and that the club did not have any record of such signed minutes of meeting. He only became the general manager of the club subsequent to that meeting.

[42] The plaintiff was unable to produce the minutes of that meeting. PW4 was subpoenaed by the plaintiff to testify in the trial. PW4 was at the material time the deputy president of the club. He testified that there were discussions of costs savings and he attended that meeting but could not produce a signed copy of the minutes of that meeting. PW5 and DW7 had also attended this meeting.

[43] Notwithstanding all that, there was no letter or confirmation from the club in reply to the several letters from the plaintiff on the value engineering and there was no letter from the club to confirm that it had given the instructions to the plaintiff to implement the value engineering exercise not to complete the subsoil drainage system as PW1 had testified. None of the witnesses was able to produce such a letter.

[44] I refer to the handover notes to the in-coming deputy president of the club (DW5) dated 25 October 2009 (see pp 247–293 of bundle E) from the previous president and deputy president ('PW4') of the club. Although that letter referred to defects and outstanding works on the golf course, there was no reference in the letter to any instructions given to the plaintiff to carry out value engineering and not to complete the subsoil drainage system.

[45] Apart from the plaintiffs letters and that unsigned minutes which the plaintiff relied on, which were not confirmed or agreed to by the club, there was no variation order or any agreement or any document signed to support the plaintiffs contention that the club had instructed the plaintiff not to complete the subsoil drainage system. Clause 14.2 of the agreement stated that no variation would be effective unless made in writing and agreed upon by all parties.

[46] Paragraph 14 of that minutes of meeting did not specifically instruct the plaintiff not to complete the subsoil drainage system. Instead, it requested the plaintiff and E & G Parslow to look into further cost savings on landscaping work and other yet to be completed works wherever possible. The evidence showed that the plaintiff by its letter dated 11 March 2008 to Yong Yong decided not to complete the subsoil drainage works and landscaping. As stated above, there was no confirmation that the club had agreed to the plaintiff not to complete the subsoil drainage works. Therefore the plaintiffs contention that the plaintiff did not complete the subsoil drainage on the instructions of the club could not be sustained.

[47] Apparently the management of the club, in their haste to meet the deadline of the opening ceremony of the golf-course, had overlooked the terms and conditions of the agreement and the deed. Pursuant to the agreement and the deed there was no necessity to implement cost-savings by the club due to extra works or variations. There was no variation or amendment to the agreement or the deed. There was no waiver, in writing, by the club and estoppel did not apply to the facts in this case.

[48] Based on the agreement, the deed and the evidence before the court, there was no reason for the club to instruct the plaintiff not to complete the subsoil drainage system, which was important to the golf course and which the club aspired for it to be of competition standard, in order to offset the extra costs incurred to build the additional facilities to the club house due to costs over-run. There was also no reason for any cost-savings or for the plaintiff to ask for any additional payments for the additional facilities to be built for the club house or due to costs over-run because the plaintiff had agreed not to ask for any extra payment beyond the agreed contract sum of RM12m due to any additional works or variations carried out to the golf course and the club house in consideration of the land to be alienated to the plaintiff pursuant to the deed.

[49] The plaintiff did not present any evidence of cost over-run and whether such costs exceeded RM20m. The evidence established that the plaintiff had been alienated the 62 acres of land and had been adequately compensated to carry out the golf course and club house as agreed pursuant to the agreement and the deed. Therefore there was no reason for the plaintiff not to complete the subsoil drainage system and landscaping of the golf course due to any costs over-run or cost-savings.

[50] The evidence established that the plaintiff did not complete the subsoil drainage system and landscaping. It did not complete the golf course as at 30 August 2008. Therefore the plaintiff had breached the terms and conditions of the contracts and the club was entitled to compensation. The plaintiff failed to prove that it was entitled to be paid the sum of RM1,956,800 plus the agreed

interest. The plaintiff did not provide any estimates or invoices or the costs to be incurred to construct the 93 pits and landscaping which were omitted or any quotations or costs to be incurred for the remedial works to the subsoil drainage system carried out by the club to the golf course.

[51] The club had filed the counterclaim against the plaintiff, PW1 and E & G Parslow that they had colluded to fraudulently certify that the works under the contract had been satisfactorily carried out and completed which in fact were not. The club pleaded that the first, second and third defendants knew they were not entitled to do so because they were untrue, that they were not entitled to make progress claims based on the interim certificates and the certificate of practical completion and were not entitled to make the final claim for the balance of the contract sum.

[52] The fact that a person is a director of a limited company does not by itself render him liable for torts committed by the company unless he procures or directs the commission of the tort: *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd* [1924] 1 KB 1, *Wah Tat Bank Ltd & Ors v Chan Cheng Kum* [1975] 1 MLJ 97. The standard of proof required where there is an allegation of fraud in a civil proceeding is one of beyond reasonable doubt and not on a balance of probabilities: *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1. In respect of the allegation of fraudulent collusion, the tort of collusion or conspiracy to defraud involves an element of fraud. The standard of proof is also beyond reasonable doubt: *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393; [2010] 9 CLJ 389.

[53] I refer to cl 5.1.6 of the agreement which stated that the contract sum of RM12m for the development and completion of the project be paid to the plaintiff by forty eight instalments of RM250,000 each, within 14 days from the month it was due provided that the plaintiff was required to satisfy the club that the value of the work for the project was in excess of the total sum paid by the club up to the month being claimed. Clause 5.1.6(a) stated that the progress (of the work) be in accordance with the work plan and milestones to be agreed upon between the plaintiff and the club or the development sub-committee of the club duly formed to supervise the construction of the golf-course and club house respectively.

[54] The golf course development sub committee (GCD sub committee) held its first meeting on 1 December 2005 which among others included Tuan Hj Morshidi Ghani (the present State Secretary of Sarawak) as the chairman, PW3 and DW7. Items nine and ten of that minutes provided for the plaintiff to submit progress report fortnightly and to brief the subcommittee on the course design and progress of work (see pp 1–2 of bundle E). On 23 December

2005, the GCD subcommittee confirmed that based on work done to date and certified by Mr Samuel Tiew and Tuan Hj Morshidi, it recommended the third payment of RM250,000 to the plaintiff (pp 6–7 of bundle E).

[55] Since then the GCD sub committee had approved and recommended the monthly progress payments of RM250,000 to the plaintiff. Since then there was no complaint and no evidence that the progressive works were not satisfactorily carried out by the plaintiff up to the date of the certificate of practical completion. The evidence showed that the plaintiff submitted its final account to the club for the balance of the contract sum of RM2,256,800 as at 18 September 2009. On 16 October 2009 the club confirmed the final account of the plaintiff. CW5, who was then the treasurer of the club, had testified that he together with PW4 had approved the final account based on the recommendation of the GCD subcommittee. The interim payment certificates were exhibited in bundle F.

[56] Based on the evidence adduced, there was no evidence that the plaintiff had fraudulently certified the works under the contract had been satisfactorily carried out were false or untrue. The interim payment certificates or monthly progress claims for the works done were approved and recommended by the GCD subcommittee to the management committee of the club for the progress payments to be made. If there was any fraud or collusion as such, as alleged by the club, the GCD subcommittee constituted to supervise the works would have known or discovered any fraudulent certificates or claims by the plaintiff. DW7 did not testify as such. The chairman of the subcommittee was not called to testify as such. It must be noted that the works were carried out by Yong Yong as the contractor of the golf course. There was no complaint of fraud or collusion against Yong Yong and it is not a party in this action. Based on the evidence, there was no such collusion between the plaintiff, PW1 and E & G Parslow.

[57] There was also no evidence of collusion or concealment by the plaintiff, PW1 and or E & G Parslow on the subsoil drainage system of the golf course. The GCD subcommittee had regular meetings on the works and progress on the golf course including the subsoil drainage system. The golf course defects inspection reports of November 2008 included inspections to the subsoil drainage system. There was no complaint that the works and progress on the subsoil drainage system had been concealed from the club or from the GCD subcommittee and from those who carried out the inspections and prepared the golf course defects inspection reports on behalf of the club.

[58] In para 17 of its defence and counterclaim, the club, inter alia, alleged that E & G Parslow failed to supervise that the plaintiff built the golf course of competition standard or failed to supervise that the plaintiff built the drainage

of the golf pits in accordance with design and specifications or negligently issued or failed to issue the certificate of practical completion. It was also alleged that the club relied on the professional advice of and certification of all works under the contracts by E & G Parslow.

[59] Although CW1 had signed on the CPC together with PW2, CW3 decided not to sign on the CPC because he said the construction of the golf course had not achieved the expected standard. CW3 subsequently had explained that CW1 had signed on the certificate of practical completion after CW1 had inspected the golf course to determine the outstanding defects which were stated in the certificate that the golf course was subject to the completion of any outstanding work and the making good of any defects. As stated above, there was no evidence of collusion or fraud on the part of CW1 and or E & G Parslow in signing on the CPC.

[60] Although E & G Parslow as the golf course architect would be able to foresee that the various acts or omissions complained of would result in delays or non-completion of the works by the plaintiff and consequential financial loss to the club, foreseeability of harm or damages is not the only test or factor in determining the existence of a duty of care. As a matter of law, foreseeability of injury or damage does not automatically lead to a duty of care: *Loh Chiak Eong & Anor v Lok Kok Beng & Ors* [2013] 1 MLJ 27.

[61] In addition to the foreseeability of damage, there should exist, between the party owing the duty and the party to whom it is owed, a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable and that the law should impose a duty of a given scope upon the one party for the benefit of the other: *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

[62] Reading the several contracts in this suit, the club was not a client of E & G Parslow and or vice versa. There was no agreement between the club and E & G Parslow. E & G Parslow was not engaged or appointed by the club. E & G Parslow was engaged by Yong Yong with the consent of the plaintiff and the club. It meant that the club had agreed or gave permission or did not object to E & G Parslow to be engaged as the architect by Yong Yong.

[63] E & G Parslow's scope of work, duties and or obligations were set out in its contract signed with Yong Yong. Reading that contract there was no requirement and no obligation on E & G Parslow to sign any certificate of practical completion nor any interim or progressive certificates. Part III of that contract also stated that no co-coordination, administration or wide-ranging quality control roles by E & G Parslow were included.

[64] CW1 and CW3 had attended meetings with representatives of the club and had given inputs or advice on the golf course. E & G Parslow's role was to design and prepare the specifications of the golf course. During the construction phase of the project, E & G Parslow was required to visit the site at regular intervals related to the extent and nature of construction in progress in order to ensure correct implementation of design philosophy in the general sense (p 223 of bundle B). There was no complaint on the design or specifications of the golf course prepared by E & G Parslow. There was no loss or damage caused to the club from the design or specifications. There was no reason to impose a duty of care on E & G Parslow based on the facts in this case *Kerajaan Malaysia lwn Cheah Foong Chiew dan lain-lain* [1993] 2 MLJ 439.

[65] The complaints of the club were that the plaintiff failed to complete the golf course, which amounted to a breach of the contracts. That was outside the scope and responsibility of E & G Parslow as the architect to prevent the breach or to unite resources and to coordinate the execution of the project which included the club house which was not designed by E & G Parslow. That role fell on PW2 who was specifically appointed the project management consultant cum technical advisor of the whole project or on Yong Yong as the contractor of the golf course. PW2 was also not sued and not a party in this action. On the facts and circumstances in this case, there was no negligence or any duty of care by E & G Parslow to the club. The facts in *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 10750 & Anor* [1999] 2 SLR 449 are different from the facts of this case. (See also *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a firm) & Ors* [1997] 3 MLJ 546; [1999] 8 CLJ 131).

[66] In respect of damages, DW2 prepared a report based on his inspection of the golf course on 31 July 2009. DW2 had commented that the plaintiff had produced a very acceptable golf course that had the potential to become a good asset and that once the plaintiff had completed the remedial works and for tree planting and landscaping to be carried out, the plaintiff should be released from any further responsibility for the golf course. His report then stated that the remaining issue was the poor maintenance by the other maintenance contractor (see pp 65–66 of bundle I).

[67] The preliminary report of DW2 in May 2010 (undated) (see pp 1–5 of bundle I) stated that whilst the actual number of drainage pits appeared to be correct, after a detailed investigation of the actual construction of these pits, it was evident that they were not built in accordance with the specifications and these caused many problems such as drainage water backing up and waterlog around the pits associated with the poor overall drainage of the golf course.

DW2 reported that about 20 pits did not have more than 50mm of coarse sand installed as required under the specifications.

[68] The report stated that the remedial works to the 306 pits would take several days and would cost RM746,640, that the estimated costs to install 4,275 metres of subsoil drainage coil would be RM406,125 and the estimated costs of tree planting would be RM450,000, the total costs would be RM1,602,765.

[69] Based on his report dated 5 November 2010, the remedial costs to 324 pits would be RM1,119,096 and the installation of the subsoil drainage coil would cost RM235,125, the total costs would be RM1,354,221. His report did not include the requirement for tree planting and landscaping. DW2 then included green fees losses, membership losses, hidden and other items which he added up to RM3,934,221.

[70] James Cameron (deceased) prepared a report dated 5 November 2010 for the club. His report stated that the estimated costs of overall remedial works including irrigation, internal construction of greens, internal construction of tees, internal construction of bunkers and main drainage would be RM5,025,000. The club relied on these estimated costs as the basis of its claims against the first to third defendants by way of the counterclaim.

[71] His report stated that 228 of the pits did not comply with the design requirement which resulted in the golf course becoming soggy. His report stated that the estimated costs to remedy the pits amounted to RM1,550,000 at a average price of RM4,780 per pit and a possible provisional cost of RM825,000 to provide subsoil drainage to all fairway pits. A quick calculation of RM4,780 per pit multiplied by 228 pits amounted to RM1,089,840 only. His calculation of the estimated costs of RM1,550,000 could not be correct.

[72] It should be noted that DW2's report did not require nor provide for any remedial works to irrigation, internal construction of greens, internal construction of tees, internal construction of bunkers and main drainage as per James Cameron's report. DW2's estimated costs amounted to RM1,354,221 only and these contrasted with the estimated costs of RM5,025,000 of James Cameron. Even when DW2 included provisions for green fees losses, membership losses, hidden items and other items amounting to RM3,934,221, his estimates were very much lower than the estimates of James Cameron of RM5,025,00. Obviously the estimates of James Cameron were excessive and could not be correct.

[73] The evidence showed that these remedial works had been done and were carried out by the club. There was no invoice or bill of costs issued or

exhibited by any contractor or subcontractor for such works done. Even if the works were carried out by the club itself and not by contractors, the estimates of DW2 and James Cameron however probable they might be, the onus was on the club to prove the loss or damages. The club has to prove both the fact and the amount of damages: *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 644,

[74] In respect of the loss of revenues from lower club membership subscriptions and lower usage of the golf course, these did not result from the poor workmanship or delay in the completion of the golf course. The evidence showed that the club intended to levy or increase the membership fees in order to finance the golf course and golf club house project. The majority of members of the club were not golfers and did not agree to the levy or increase in the membership fees which was subsequently rejected by the members. Members who wished to use the facilities at the new golf course would have to pay separate fees. The evidence showed that the majority of members did not play golf and did not use the facilities at the golf course and golf clubhouse. The plaintiff, PW1 and or E & G Parslow could not be responsible for such losses.

[75] On the question of costs, the trial had taken a long time to complete due to the many witnesses called to testify, some were not available on the dates scheduled for trial. Many repetitive questions and irrelevant questions were asked and argued contributing to the lengthy trial. Although many bundles of documents were filed, most of the documents were not referred to during the trial. Although many issues were raised and argued during the trial, they were not complex issues to be decided.

[76] For the reasons given, I make the following orders:

(a) the plaintiffs claim against the club is dismissed with costs of RM60,000;

(b) the club's counterclaim against the plaintiff for breach of contracts is allowed, special and general damages, if any, to be assessed by the deputy registrar and there is no necessity for the declarations in prayers three, four and five of the counterclaim;

(c) the club's counterclaim against the first, second and third defendants for fraud, collusion and false claims is dismissed; and

(d) the club's counterclaim against the third defendant for negligence is dismissed with costs of RM30,000.

Order accordingly.

Reported by Kanesh Sundrum